

**Objection to Issuance of Renewal of Final NPDES Permit No. IN0061344 issued to
City of Hobart
Hobart, Lake County, Indiana
2010 OEA 220, (09-W-J-4256)**

OFFICIAL SHORT CITATION NAME: When referring to 2010 OEA 220 cite this case as
City of Hobart, 2010 OEA 220.

TOPICS:

| | |
|-------------------------------------|-------------------------------------|
| Official notice | Motion to Consolidate |
| Cause 04-W-J-3330, 2010 OEA 1 | Supplemental briefing |
| wastewater treatment plant | Motion to dismiss |
| Original NPDES permit | collateral estoppel |
| Renewal NPDES permit | issue preclusion |
| new discharger | 327 IAC 5-2-11.7(a)(2) |
| mercury discharge limits | 327 IAC 15-15-9 |
| bioaccumulative chemical of concern | Ind. Trial R. 12(B)(6) |
| antidegradation analysis | NPDES (National Pollution Discharge |
| Lake Michigan | Elimination System) |
| Outstanding State Resource Water | |

PRESIDING JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM:

Pro se Petitioners:

Sierra L. Alberts, Esq.

William M. Hebert, Paul W. Redar, Sr., Cynthia Robbins,
Robin Lynn Phillips

Petitioners City of Gary/

Gary Sanitary District:

Susan J. Severtson, Esq., Hamilton L. Carmouche, Esq.

Frederic P. Andes, Esq., Erika K. Powers, Esq.,

David T. Ballard, Esq.; Barnes & Thornburg, LLP

Petitioners City of Lake Station/

Lake Station Sanitary District:

James B. Meyer, Esq.; Meyer & Wyatt, PC

Respondent/Permittee City of

Hobart and Hobart Sanitary District: John P. Bushemi, Esq.; John P. Bushemi & Associates
Joseph P. Allegretti, Esq.

ORDER ISSUED:

December 16, 2010

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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Supplemental Briefing in Cause 04-W-J-3330 issued to Petitioners William M. Hebert, Robin Lynn Phillips, Paul W. Redar, Sr., Cynthia Robbins and City of Lake Station and Lake Station Sanitary District;

- July 1, 2010 Notices of Proposed Orders of Dismissal issued to Petitioners Robin Lynn Phillips, Paul W. Redar, Sr., and Cynthia Robbins;
- December 15, 2010 Final Orders of Dismissal issued to Petitioners Robin Lynn Phillips, Paul W. Redar, Sr., and Cynthia Robbins.

The Court also takes official notice, and incorporates herein, by reference, its January 19, 2010 Findings of Fact, Conclusions of Law and Final Order issued in OEA Cause 04-W-J-3330¹, which Final Order held that no genuine issues of material fact existed as to whether Respondent, IDEM's, April 1, 2004 issuance of National Pollution Discharge Elimination System permit No. IN0061344 to the City of Hobart for a planned municipal wastewater treatment plant violated Indiana's antidegradation regulations.

The Chief Environmental Law Judge ("ELJ"), having considered the petitions, testimony, evidence, and pleadings of the parties, now finds that judgment may be made upon the record. The Chief ELJ, by substantial evidence, and being duly advised, now makes the following findings of fact and conclusions of law and enters the following Final Order:

FINDINGS OF FACT

1. The City of Hobart's wastewater is currently treated through two facilities, Hobart's Nob Hill wastewater treatment plant ("WWTP"; National Pollution Discharge Elimination System ("NPDES") Permit IN0041891), and the GSD wastewater treatment plant.
2. Nob Hill WWTP is an aging facility which has difficulty in consistently meeting its permit limits, resulting in IDEM taking enforcement action against Hobart.
3. The City of Hobart applied for a new wastewater treatment plant to treat all of its wastewater. If approved, the Nob Hill WWTP facility would be closed, Hobart would disconnect from GSD, and the City of Hobart would be a new discharger. On April 1, 2004, IDEM issued NPDES permit No. IN0061344 to the City of Hobart ("Hobart Original NPDES Permit" or "Original Permit"), effective May 1, 2004. The Original Permit has yet to come into operation.
4. The Original Permit authorized the City of Hobart to construct and operate a new Class IV 4.8 million gallon per day ("MGD") Wastewater Treatment Plant ("WWTP"), to be constructed next to the Deep River. Hobart's Original NPDES Permit will allow an additional discharge of mercury into Deep River. Original Permit limits for mercury discharge are a monthly average of 1.3 ppt (parts per trillion), 0.000052 pounds per day, and

¹ Judicial review is pending in Marion Superior Court under cause number 49F12-1002-MI-007318.

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a daily maximum of 3.2 ppt, and 0.00013 pounds per day as daily maximum discharges. Mercury is a bioaccumulative chemical of concern (“BCC”), addressed in 327 IAC 2-1.5-6.

5. On April 23, 2004, the City of Gary and GSD timely petitioned for administrative review of Hobart’s Original NPDES Permit, challenging the Original Permit’s mercury discharge limits and IDEM’s antidegradation analysis which allowed the mercury discharge limits. GSD’s April 23, 2004 petition for administrative review was assigned OEA cause number 04-W-J-3330. Petitioners in OEA cause 04-W-J-3330 also included the City of Lake Station, Lake Station Parks Department, James Bush, Dorothy Bush, William Mitchell, Patrick Strickland and James Boyd, Sr. OEA’s case file from cause number 04-W-J-3330, party pleadings and Court orders, are part of OEA’s administrative agency records.
6. When the Hobart Original NPDES Permit was issued, GSD was operating under NPDES permit NPDES Permit IN0022977 (effective November 1, 1994, and administratively extended) issued by IDEM on September 30, 1994. GSD’s authorized mercury discharge limits were set at a monthly average limit of 30 parts per trillion (“ppt”) and a daily maximum of 70 ppt.
7. On June 13, 2006, GSD received a new NPDES permit (“New GSD Permit”) from IDEM. The New GSD Permit contains more restrictive mercury discharge limits than the September 30, 1994 GSD Permit, with an average monthly limit of 1.3 ppt and a daily maximum limit of 3.16 ppt.
8. On April 22, 2009, IDEM issued a NPDES renewal permit (“Hobart Renewal Permit”) for Hobart’s Original NPDES Permit. Hobart’s Original and Renewal Permits have the same mercury discharge limits and are supported by the same antidegradation analyses.
9. Petitions for Administrative Review of the Hobart Renewal Permit were filed on May 2, 2009 by William M. Hebert, on May 5, 2009 by Cynthia Robbins, on May 6, 2009 by Paul W. Redar, Sr., on May 7, 2009 by Robin Lynn Phillips, on May 8, 2009 by City of Gary and Gary Sanitary District, on May 11, 2009 by City of Lake Station and Lake Station Sanitary District (LSSA). These petitions for administrative review were assigned OEA cause number 09-W-J-4256.
10. The Petitions for Administrative Review of the Hobart Original Permit in Cause 04-W-J-3330 raised substantially similar challenges to the same mercury discharge limits and antidegradation analyses as the Petitions for Administrative Review of the Hobart Renewal Permit in Cause 09-W-J-4256.
11. In OEA cause number 04-W-J-3330, the parties moved for summary judgment, which was fully briefed and argued orally by March 27, 2009. The Court’s January 19, 2010 Findings of Fact, Conclusions of Law and Final Order (“Final Order”) sustained the Original Permit and specifically addressed mercury discharge limits and IDEM’s antidegradation analysis.

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12. In its June 8, 2009 Motion to Consolidate and for Supplemental Briefing², GSD supported its Motion with the contention that its challenges to Hobart's Original and Renewal Permits address the same issues, but that the Petition addressed to the Renewal includes one additional issue: that the more restrictive mercury discharge limits described above in paragraphs X, Y in GSD's 2006 permit is relevant to IDEM's antidegradation analysis.
13. IDEM's June 16, 2009 Objection to GSD's Motion to Consolidate and for Supplemental Briefing included a Motion to Dismiss, to which GSD responded. Petitioners William M. Hebert, Robin Lynn Phillips, Paul W. Redar, Sr., Cynthia Robbins and City of Lake Station and Lake Station Sanitary District did not respond to January 27, 2010 responsive briefing orders. Petitioners Robin Lynn Phillips, Paul W. Redar, Sr. and Cynthia Robbins did not respond to July 1, 2010 Notices of Proposed Orders of Dismissal and were issued Final Orders of Dismissal on December 15, 2010.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management ("IDEM") is charged with implementation and enforcement of Indiana's environmental laws and rules. I.C. § 13-14-1-1, *et seq.* The Office of Environmental Adjudication ("OEA") has jurisdiction for administrative review of the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.
3. In this case, the Petitioners challenge IDEM's April 22, 2009 renewal of Hobart's NPDES permit containing the same mercury discharge limits and antidegradation analysis stated in Hobart's original NPDES permit, issued on April 1, 2004. GSD's June 8, 2009 Motion to Consolidate and for Supplemental Briefing seeks to consolidate the challenges to Hobart's original permit and Hobart's renewal permit. Indiana Trial Rules may be applied to proceedings before the OEA. 315 IAC 1-3-1(b)(18). Consolidation of cases is addressed in Ind. Trial Rule 42. Ind. Tr. R. 42(A) provides discretion for a presiding officer to consolidate cases "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Ind. Tr. R. 42(B) allows a court the discretion to order separate hearings "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy". The petitions for administrative review of Hobart's original permit and its renewal permit involve common

² GSD's June 8, 2009 Motion provided that GSD consulted with the government parties about its Motion. GSD noted that the Motion was agreed to by Lake Station, but opposed by IDEM and Hobart. GSD further noted that the opponents intended to file written responses. IDEM filed a written response and Motion to Dismiss, no further pleadings were filed by Hobart.

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questions of fact or law. The parties differ to some degree, but the parties without commonality to both cases did not raise challenges different from the substantive briefing in either case. On the challenge to Hobart's original permit under cause 3330, the parties concluded summary judgment briefing by March 27, 2009; the Court closed Cause 3330 by its issuance of a Final Order on January 19, 2010. An order of consolidation into a closed case would require the parties to exert litigation time and effort to invoke the court's jurisdiction after its jurisdiction has been terminated by a final order. In the instant challenge to the renewal permit, the Court has incorporated the record from the challenge to the original permit. Therefore, the efforts exerted on the identical issues raised in the earlier case are preserved without requiring consolidation. Petitioners GSD's Motion to Consolidate the petitions for administrative review of the renewal permit (OEA Cause 09-W-J-4256) with the closed, decided administrative review of the original permit (OEA Cause 04-W-J-3330) should be denied.

4. In its June 8, 2009 Motion, GSD sought supplemental briefing on discharge limits approved in the Hobart NPDES permits, asserting that as IDEM's mercury discharge limits stated in GSD's June 13, 2006 NPDES permit are more restrictive than those stated in GSD's November 1, 1994 NPDES permit, the difference in limits between GSD's 1994 and 2006 permits is relevant to IDEM's antidegradation analysis in the Hobart Renewal permit. On the challenge to Hobart's original permit, the parties concluded summary judgment briefing by March 27, 2009. GSD knew its more restrictive mercury discharge limits as they were stated in GSD's June 13, 2006 NPDES permit, and could have raised the issue by the time when thorough briefing concluded on the Hobart original permit on March 27, 2009. As presented by the parties to these cases, antidegradation analysis is case-sensitive, therefore the relevance of IDEM's mercury discharge limits stated for GSD permits in 1994 and 2006 is very limited to the analysis conducted for Hobart's original permit in 2004, and included without modification in the 2009 renewal. GSD's motion for supplemental briefing should be denied.
5. In this case, IDEM seeks dismissal of the petitions for administrative review, asserting that Petitioners have failed to state a claim upon which relief can be granted. IDEM's Motion to Dismiss, filed per Ind. Tr. R. 12(B)(6) for failure to state a claim upon which relief can be granted, is a test of the legal sufficiency of a claim, not the facts supporting the claim. *Harmony Health Plan of Indiana, Inc. v. Indiana Dep't of Admin.*, 864 N.E.2d 1083, 1089 (Ind. Ct. App. 2007) (citing *Gorski v. DRR, Inc.*, 801 N.E.2d 642, 644 (Ind. Ct. App. 2003)). When ruling on a motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004). All reasonable inferences must be drawn in favor of the non-moving party. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007). On a motion to dismiss for failure to state a claim for relief under Ind. Tr. R. 12(B)(6), the facts alleged in the complaint are taken as true. *Morris v. City of Kokomo*, 178 Ind. App. 56, 381 N.E.2d 510 (Ind. Ct. App. 1978); *Pitts v. Mills*, 165 Ind. App. 646, 333 N.E.2d 897 (Ind. Ct. App. 1975). The complaint will be dismissed if the facts, even if true,

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do not support the relief requested. *Minks v. Pina*, 709 N.E.2d 379, 381 (Ind. Ct. App. 1999); *Davidson v. Crossman Communities, Inc.*, 699 N.E.2d 789, 791 (Ind. Ct. App. 1998).

6. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. 315 IAC 1-3-10(b); *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the Environmental Law Judge (“ELJ”), I.C. § 4-21.5-3-27(d). Deference to the agency’s initial determination is not allowed. *Id.*; “*De novo* review” means that “all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.” *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).
7. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). While the parties disputed whether IDEM’s issuance of the City of Hobart NPDES Permit was proper, OEA is authorized “to make a determination from the affidavits . . . pleadings or evidence.” I.C. § 4-21.5-3-23(b). “Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test.” *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559,565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac, Pulaski County, Indiana; HydroTech Consulting and Engineering, Inc. (04-F-J-3338)*, 2005 OEA 26, 41.
8. Petitioners’ timely filed Petitions for Review objecting to IDEM’s April 22, 2009 renewal of the April 1, 2004 Hobart NPDES Permit are based on the assertion that the mercury discharge levels authorized per IDEM’s antidegradation analysis incorporated into discharge levels authorized in the original permit erroneously allowed new discharge of mercury into an Outstanding State Resource Water at levels which would result in a significant overall environmental benefit to Lake Michigan. Petitioners are “aggrieved or adversely affected” by IDEM’s determination, per I.C. § 4-21.5-3-7, and qualify to seek administrative review before the OEA.
9. In the administrative review of the original permit, parties to OEA Cause 04-W-J-3330 contested IDEM’s antidegradation analysis for Hobart’s NPDES permit concerning mercury, as a matter of law. IDEM utilized 327 IAC 5-2-11.7(a)(2)(A) and (B) in conducting its antidegradation analysis for limits stated in the original permit, and sustained by the Court in

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its Final Order in OEA Cause 04-W-J-3330. Indiana antidegradation regulations apply to “a new or increased discharge of a pollutant or pollutant parameter from a new or existing Great Lakes discharger into a tributary of an Outstanding State Resource Water (“OSWR”) for which a new or increased permit limit would be required”. 327 IAC 5-2-11.7(A)(2). Hobart’s original and renewal NPDES Permits authorize discharge into Deep River, a tributary of Lake Michigan, an OSWR, per 327 IAC 2-1.5-19(b)(2). Mercury is a bioaccumulative chemical of concern (“BCC”). 327 IAC 2-1.5-6.

10. The NPDES Permit subject to challenge in this cause is a renewal permit, which permit does not authorize a new or increased discharge or a new or increased permit limit from that stated in the Original Permit. 327 IAC 5-2-11.7(A)(2) applies only to new or increased discharges or permit limits. The Petitions challenging the Renewal Permit fail to state facts or allegations applicable to the Renewal Permit, therefore there is no claim for relief which this Court can grant.
11. The issues raised by Petitioners in their challenge to Hobart’s NPDES Renewal Permit were litigated and decided on January 19, 2010 during administrative review of Hobart’s NPDES Original Permit under OEA Cause 04-W-J-3330. These issues cannot be retried in this cause. Collateral estoppel or issue preclusion bars subsequent litigation of an issue necessarily adjudicated in a former suit if the same issue is presented in the subsequent suit." *Bourbon Mini-Mart, Inc. v. Gast Fuel & Servs., Inc.*, 783 N.E.2d 253, 257 (Ind. 2003) (quoting *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 968 (Ind. 1998)). "Issue preclusion applies only to matters actually litigated and decided, not all matters that could have been decided." *Miller Brewing Co. v. Ind. Dep't of Revenue*, 903 N.E.2d 64, 68 (Ind. 2009). Where collateral estoppel applies, the former adjudication is conclusive in the subsequent action even if the two actions are on different claims. *Afolabi v. Atl. Mortgage & Inv. Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006). "[G]enerally facts available at the time of the first suit are foreclosed in a subsequent suit, as are new arguments based on the same legal theory." *Miller Brewing*, 903 N.E.2d at 68. “We have used a two-part analysis to determine whether issue preclusion applies: (1) whether the party in the prior action had a full and fair opportunity to litigate the issue and (2) whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case”. *Afolabi*, 849 N.E.2d at 1175.
12. The mercury discharge limits and IDEM’s antidegradation analysis, and environmental impacts claimed to arise from those limits, stated in Hobart’s NPDES Original Permit were litigated fully by the parties in OEA Cause 04-W-J-3330. In Petitioners’ challenge to Hobart’s NPDES Original Permit, the parties had a full and fair opportunity to litigate these issues, thus satisfying the first analytical point for issue preclusion stated in *Afolabi*. The particular facts in controversy in Petitioners’ challenge to Hobart’s NPDES Renewal Permit in this cause are identical to the facts disputed in the challenge to Hobart’s NPDES Original Permit, supporting a conclusion that there is no element of unfairness to consider per the second analytical point for issue preclusion stated in *Afolabi*. The Court’s January 19, 2010 Final Order on Hobart’s NPDES Original Permit in OEA Cause 04-W-J-3330 is conclusive to Petitioners’ challenges on the same issues to Hobart’s NPDES Renewal Permit. Collateral

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estoppels, or issue preclusion, bars relitigation of the same issues in this case. The Petitions for Administrative Review of Hobart's NPDES Renewal Permit should be denied.

FINAL ORDER

AND THE COURT, being duly advised, hereby **FINDS AND ORDERS** that Respondent, Indiana Department of Environmental Management, provided substantial evidence required to meet its burden of showing that Petitioners failed to state a claim upon which relief can be granted in support of IDEM's Motion to Dismiss per Ind. Tr. R. 12(B)(6). Petitioners' challenge to the renewal of the City of Hobart's NPDES Permit was fully and fairly litigated in the administrative review of Hobart's Original NPDES Permit under OEA Cause 04-W-J-3330, thus precluding the litigation of the same issues in this cause. Respondent, Indiana Department of Environmental Management, is entitled to judgment as a matter of law sustaining its issuance of the renewal of City of Hobart NPDES Permit No. IN0061344.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Respondent, Indiana Department of Environmental Management's, Motion to Dismiss is **GRANTED**; Petitioners, City of Gary, Gary Sanitary District, William M. Hebert, City of Lake Station and Lake Station Sanitary District's Petitions for Administrative Review are **DISMISSED**. Judgment is entered in favor of Respondent, Indiana Department of Environmental Management. This cause is **DISMISSED**. All further proceedings are **VACATED**.

IT IS FURTHER ORDERED that Petitioners GSD's Motion to Consolidate the petitions for administrative review of the renewal permit (OEA Cause 09-W-J-4256) with the closed, decided administrative review of the original permit (OEA Cause 04-W-J-3330) is **DENIED**.

IT IS FURTHER ORDERED that Petitioners GSD's Motion for Supplemental Briefing is **DENIED**.

You are further notified that pursuant to provisions of I.C. § 4-21.5-7-5, the Office of Environmental Adjudication serves as the ultimate authority in administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of I.C. § 4-21.5, *et seq.* Pursuant to I.C. § 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 16th day of December, 2010 in Indianapolis, IN.

Hon. Mary L. Davidsen
Chief Environmental Law Judge